91-1640

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Supreme Court, U.S.
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Case Number:

In the
UNITED STATES SUPREME COURT
OCTOBER TERM

Michael A. Nelson

Plaintiff-Appellant

Versus

U.S. Department of Justice

Defendant-Appellee

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

PETITION FOR WRIT OF CERTIORARI

APPENDIX

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 90-8954
D.C. Docket No. 1:90-CV-1119-ODE

Michael A. Nelson,
Plaintiff- Appellant,

versus

U. S. Department of Justice,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
January 21, 1992

Before Cox, Circuit Judge, Johnson and Reavley*, Senior Circuit Judges.

PER CURIAM:

Michael A. Nelson appeals the district court's judgment dismissing his action for failure to state a claim. We affirm.

In the district court, Nelson alleged that for the past eight years he and his

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* Honorable Thomas M. Reavley, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

family have been subjected to electronic surveillance as part of a government conspiracy established to harass him, causing him among other things great emotional distress. Nelson initially sent a request to the United States Department of Justice ("DOJ"), under the Freedom of Information Act (FOIA), 5 U.S.C 552, and the Privacy Act ("PA"), 5 U.S.C. 552a, seeking the release of all materials produced by the alleged surveillance. The DOJ responded that it had no documents within the scope of the request with one exception - with regard to any documents that the DOJ might possess under the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. 1801-1811, the DOJ stated that it could neither confirm nor deny the existence of any such records within the scope of Nelson's request.

Nelson then filed this action alleging that jurisdiction is based on "the Foreign Intelligence Surveillance Act of 1978" and

that he had "sent a request for information under the Freedom of Information-Privacy Acts to the ... Justice Department. Complaint Para. 1, 4. Reasonably construing the complaint as alleging a cause of action under the FOIA, the district court analyzed Nelson's request under applicable FOIA standard.

Nelson's sole contention on appeal is that the district court erred in interpreting his complaint.[1] He contends that his complaint alleged a right under 50 U.S.C. 1806(f) of FISA, wholly separate and independent from any rights granted under FOIA or PA, that required the district court to perform an ex parte, in camera review of all materials relating to the surveillance.

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1 Through out both his initial and reply brief, Nelson repeatedly insists that he does not take issue with the district court's FOIA analysis except for the fact that it should not have been performed in the first place. We, therefore, do not review that analysis.

50 U.S.C. 1806(f) provides in pertinent part:

"Whenever a court or other authority is notified pursuant to subsection (c) or (d) of this section, or whenever a motion is made pursuant to subsection (e) of this section, or whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States ... to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this Act, the United States district court ... shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that discovery or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted.".

50 U.S.C. 1806(f) (emphasis added).

Nelson claims that the clause - "Whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States" - affords him an independent cause of action for disclosure. Assuming that Nelson's Complaint undertook to allege a cause or action under section 1806(f), and assuming (without deciding) that section 1806(f) can under some circumstances give rise to a cause of action, a request under this section must be made "pursuant to ... [some] other statute or rule." Nelson maintains that he has a cause of action for disclosure based upon the above language, indpendent of any other statute or rule of the United States. The statute's language is plainly to the contrary.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Michael A. Nelson,

Plaintiff

versus

U.S Department of Justice

Defendant

Civil Number: 1:90-CV-1119-ODE

ORDER

This case is before the court on Defendant's motion to dismiss or in the alternative, motion for summary judgment.

Plaintiff is a naturalized citizen who claims he has been under surveillance of various kinds over a lengthy period of time. He alleges that from at least 1982 to the present he and his family have been subjected to uninterrupted telephone, mail, home, and activity surveillance by means of helicopters, radar, laser communicators, and other sophisticated and elaborate tools. His

complaint raises claims under color of the Foreign intelligence Surveillance Act of 1978, 50 U.S.C. 1801, et seq. ("FISA"); the Freedom of Information Act, 5 U.S.C 552 ("FOIA"); and the Privacy Act, 5 U.S.C. 552a. He asks the court to "release all the applications, orders, documents, materials (including Audio and Visual), or information obtained or derived from electronic surveillance under FISA to the Plaintiff, so that the appropriate legal proceedings can be exercised."

Plaintiff requested information from Defendant about or relating to the alleged surveillance. Defendant advised Plaintiff that there were no documents within the scope of his request with one exception. As to documents held under FISA, Defendant explained that it could neither confirm or deny Plaintiff's request. Doing either, it said, would disclose classified information or lead to the discovery of classified information. It relies on FISA and FOIA in

asserting that it has discharged its duty to the extent allowed by law. Because it has done so, Defendant says, Plaintiff fails to state a claim on which relief can be granted. Plaintiff's request for documents from Defendant is before this court by reason of FOIA 552(a)(4)(B), which confers jurisdiction for such matters on the district courts. Should an agency of the United States decline to disclose requested information based on one or more of the nine statutory exemptions from disclosure in 552(b), the agency has the burden of sustaining that action. FOIA 552(a)(4)(B). Executive orders give meaning to the exemptions. Goldberg v. U.S. Dept. of State, 818 F.2d 71,77 (D.C. Cir. 1987), Cert. denied, 485 U.S. 904 (1988).

Defendant bases its denial of Plaintiff's request on FOIA 552(b)(1)(A), which exempts from disclosure "matters that are ... specifically authorized under criteria established by an Executive Order to

be kept secret in the interest of national defense or foreign policy." Id. The court must accord "substantial weight" to Defendant's determinations in this regard. Godberg, 818 F.2d at 78. Further,

"An agency is entitled to summary judgment if its affidavit describes the withheld information and the justification for withholding with reasonable specificity, demonstrating a logical connection between the information and the claimed exemption, ... and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.".

Executive Order 12356, Sec. 3.4(f) states in relevant part that "[in] response to a request for information under [FOIA] ... (1) an agency shall refuse to confirm or deny the existence or non-existence of requested information whenever the fact of its existence or non-existence is itself classifiable under this Order."

Defendant submits the affidavit of Mary

Lawton, Counsel for Intelligence Policy and head of the Office of Intelligence Policy and Review ("OIPR") at the United States Department of Justice. That affidavit details the manner in which Defendant processed and answered Plaintiff's request. See, Goldberg, 818 F.2d at 77-78. It also specifically describes reasons for refusing to release certain information to Plaintiff. Id. It relates in some detail the manner in which Defendant applied the statutory exemption and other definitional and operative provisions in Executive Order 12356 in arriving at a decision to deny Plaintiff's request. Id.

The court finds a logical connection between the requested information and the claimed exemption. Id. Plaintiff offers no concrete evidence to the contrary. Id. His complaint does no more than summarily state that he has been under surveillance and has been refused certain information by Plaintiff. Nor has he produced any evidence

that Defendant's response to his requests was anything other that appropriate in light of applicable law.

In light of Defendant's clear showing by affidavit supporting the FOIA statutory exemption and under authority of Executive Order 12356, the court find that Plaintff has stated no cognizable claim for relief. Fed.R.Civ.P. 12(b)(6); see, Tiftarea Shopper, Inc. v. Georgia Shopper, Inc., 786 F.2d 1115, 1117-18 (11th Cir. 1986) (stating standard under Rule 12(b)(6)); Jenkins v. Mckeithen, 395 U.S. 411, 416-17 (1969) (court should construe complaint in light most favorable to the plaintiff and accept allegations as true).

Accoringly, Defendant's motion to dismiss is GRANTED.

Plaintff's claims are hereby DISMISSED with prejudice.

SO ORDERED, this 12 day of September, 1990.

ORINDA D. EVANS
UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 90-8954
D.C. Docket No. 1:90-CV-1119-ODE

Michael A. Nelson,

Plaintiff- Appellant

versus

U.S. Department of Justice,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION FOR REHEARING
March 4, 1992

Before Cox, Circuit Judge, Johnson* and Reavley**, Senior Circuit Judges.

PER CURIAM:

The petition for rehearing filed by Appellant, Michael A. Nelson, is DENIED.

ENTERED FOR THE COURT:

/s/ Emmett R. Cox
UNITED STATES CIRCUIT JUDGE

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* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Thomas M. Reavley, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

STATUTES, CONSTITUTIONAL PROVISIONS, ETC.

1. Foreign Intelligence Surveillance Act of 1978 (FISA), 5 USCS 1801-1811

Section 1801, Definitions:

As used in this title [50 USCS 1801 et seq.]:

(a) "Foreign power" means-

(1) a foreign government or any component thereof whether or not recognized by the United States;

(2) a faction of a foreign nation or nations, not substantially composed of United States persons;

(3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;

(4) a group engaged in international terrorism or activities in preparation therefor;

(5) a foreign-based political organization, not substantially composed of United States

persons; or

(6) an entity that is directed and controlled by a foreign government or governments.

(b) "Agent of a foreign power" means-

(1) any person other than a United States person who-

(A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4);

(B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or

(2) any person who-

(A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States;

(B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States;

(C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power; or

(D) knowingly aids or abets any person in the conduct of activities described in subparagraph (A),(B), or (C) or knowingly conspires with any person to engage in activities described in subparagraph (A),(B), or (C).

(c) "International terrorism" means activities that-

(1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;

(2) appear to be intended-

(A) to intimidate or coerce a civilian population;

(B) to influence the policy of a government by intimidation or coercion; or

(C) to affect the conduct of a government by assassination or kidnapping; and

(3) occur totally outside the United States or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpretators operate or seek asylum.

(d) "Sabotage" means activities that involve a violation of chapter 105 of title

18, United States Code, [18 USCS 2151 et seq;], or that would involve such a violation if committed against the United States.

(e) "Foreign intelligence information" means-

(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against-

(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is

necessary to-

(A) the national defense or the security of the United States; or

(B) the conduct of the foreign affairs of the United States.

(f) "Electronic surveillance" means-

(1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;

(2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such

acquisition occurs in the United States;

(3) the intentional acquisition by an electronic, mechanical or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or

(4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

(g) "Attorney General" means the Attorney General of the United States (or Acting Attorney General) or the Deputy Attorney General.

(h) "Minimization procedures", with respect to electronic surveillance, means-

(1) specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;

(2) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in subsection (e)(1), shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance;

(3) notwithstanding paragraphs (1) and (2),

procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes; and

(4) notwithstanding paragraphs (1), (2), and (3), with respect to any electronic surveillance approved pursuant to section 102(a) [50 USCS 1802(a)], procedures that require that no contents of any communication to which a United States person is a party shall be disclosed, disseminated, or used for any purpose or retained for longer than twenty-four hours unless a court order under section 105 [50 USCS 1805] is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person.

(i) "United States person" means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined

in section 101(a)(20) of the Immigration and Nationality Act [8 USCS 1101(a)(20)], an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1),(2), or (3).

(j) "United States", when used in a geographic sense, means all areas under the territorial sovereignty of the United States and the Trust Territory of the Pacific Islands.

(k) "Aggrieved person" means a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance.

(l) "Wire communication" means any communication while it is being carried by a

wire, cable, or other like connection furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications.

(m) "Person" means any individual, including any officer or employee of the Federal Government, or any group, entity, association, corporation, or foreign power.

(n) "Contents", when used with respect to a communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication.

(o) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, and any territory or possession of the United States. (Oct. 25, 1978, P.L. 95-511, Title

I, 92 Stat. 1783.)

Section 1804, Applications for court orders

(a) Submission by Federal officer; approval of Attorney General; contents.

Each application for an order approving electronic surveillance under this title [50 USCS 1801 et seq.] shall be made by a Federal officer in writing upon oath or affirmation to a judge having jurisdiction under section 103 [50 USCS 1803]. Each application shall require the approval of the Attorney General based upon his finding that it satisfies the criteria and requirements of such application as set forth in this title [50 USCS 1801 et seq.] It shall include-

(1) the identity of the Federal officer making the application;

(2) the authority conferred on the Attorney General by the President of the United States and the approval of the Attorney General to make the application;

(3) the identity, if known, or a description of the target of the electronic surveillance;

(4) a statement of the facts and circumstances relied upon by the applicant to justify his belief that-

(A) the target of the electronic surveillance is a foreign power or an agent of a foreign power; and

(B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power;

(5) a statement of the proposed minimization procedures;

(6) a detailed description of the nature of the information sought and the type of communications or activities to be subjected to the surveillance;

(7) a certification or certifications by the Assistant to the President for National Security Affairs or an executive branch official or officials designated by the

President from among those executive officers employed in the area of national security or defense and appointed by the President with the advice and consent of the Senate-

(A) that the certifying official deems the information sought to be foreign intelligence information;

(B) that the purpose of the surveillance is to obtain foreign intelligence information;

(C) that such information cannot reasonably be obtained by normal investigative techniques;

(D) that designates the type of foreign intelligence information being sought according to the categories described in section 101(e) [50 USCS 1801(e)]; and

(E) including a statement of the basis for the certification that-

(i) the information sought is the type of foreign intelligence information designated; and

(ii) such information cannot reasonably

be obtained by normal investigative techniques;

(8) a statement of the means by which the surveillance will be effected and a statement whether physical entry is required to effect the surveillance;

(9) a statement of the facts concerning all previous applications that have been made to any judge under this title [50 USCS 1801 et seq.] involving any of the persons, facilities, or places specified in the application, and the action taken on each previous application;

(10) a statement of the period of time for which the electronic surveillance is required to be maintained, and if the nature of the intelligence gathering is such that the approval of the use of the electronic surveillance under this title [50 USCS 1801 et seq.] should not automatically terminate when the described type of information has first been obtained, a description of facts supporting the belief that additional

information of the same type will be obtained thereafter; and

(11) whenever more than one electronic, mechanical or other surveillance device is to be used with respect to a particular proposed electronic surveillance, the coverage of the devices involved and what minimization procedures apply to information acquired by each device.

(b) Exclusion of certain information respecting foreign power targets.

Whenever the target of the electronic surveillance is a foreign power, as defined in section 101(a)(1), (2), or (3) [50 USCS 1801(a)(1), (2) or (3)], and each of the facilities or places at which the surveillance is directed is owned, leased, exclusively used by that foreign power, the application need not contain the information required by paragraphs (6), (7)(E), (8), and (11) of subsection (a) [50 USCS 1801(a)(6), (7)(E), (8) and (11)], but shall state whether physical entry is required to effect

the surveillance and shall contain such information about the surveillance techniques and communications or other information concerning United States persons likely to be obtained as may be necessary to assess the proposed minimization procedures.

(c) Additional affidavits or certifications. The Attorney General may require any other affidavit or certification from any other officer in connection with the application.

(d) Additional information. The judge may require the applicant to furnish such other information as may be necessary to make the determinations required by section 105[50 USCS 1805]. (Oct. 25, 1978, P.L. 95-511, Title I, 104, 92 Stat 1788.)

Section 1805, Issuance of order

(a) Necessary findings. Upon an application made pursuant to section 104 [50 USCS 1804], the judge shall enter an ex parte order as requested or as modified approving the electronic surveillance if he finds that-

(1) the President has authorized the Attorney General to approve applications for electronic surveillance for foreign intelligence information;

(2) the application has been made by a Federal officer and approved by the Attorney General;

(3) on the basis of the facts submitted by the applicant there is probable cause to believe that-

(A) the target of the electronic surveillance is a foreign power or agent of a foreign power: Provided, that no United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the first amendment to the Constitution of the United States; and

(B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power;

(4) the proposed minimization procedures meet the definition of minimization procedures under section 101(h) [50 USCS 1804(h)]; and

(5) the application which has been filed contains all statements and certifications required by section 104 [50 USCS 1804] and, if the target is a United States person, the certification or certifications are not clearly erroneous on the basis of the statement made under section 104(a)(7)(E) [50 USCS 1804(a)(7)(E)] and any other information furnished under section 104(d) [50 USCS 1804(d)].

(b) Specifications and directions of orders. An order approving an electronic surveillance under this section shall-

(1) specify-

(A) the identity, if known, or a description of the target of the electronic surveillance;

(B) the nature and location of each of the facilities or places at which the electronic

surveillance will be directed;

(C) the type of information sought to be acquired and the type of communications or activities to be subjected to the surveillance;

(D) the means by which the electronic surveillance will be effected and whether physical entry will be used to effect the surveillance;

(E) the period of time during which the electronic surveillance is approved; and

(F) whenever more than one electronic, mechanical, or other surveillance device is to be used under the order, the authorized coverage of the devices involved and what minimization procedures shall apply to information subject to acquisition by each device; and

(2) direct-

(A) that the minimization procedures be followed;

(B) that, upon the request of the applicant, a specified communication or other common

carrier, landlord, custodian, or other specified person furnish the applicant forthwith all information, facilities, or technical assistance necessary to accomplish the electronic surveillance in such a manner as will protect its secrecy and produce a minimum of interference with the services that such carrier, landlord, custodian, or other person is providing that target of electronic surveillance;

(C) that such carrier, landlord, custodian, or other person maintain under security procedures approved by the Attorney General and the Director of Central Intelligence any records concerning the surveillance or the aid furnished that such person wishes to retain; and

(D) that the applicant compensate, at the prevailing rate, such carrier, landlord, custodian, or other person for furnishing such aid.

(c) Exclusion of certain information respecting foreign power targets.

Whenever the target of the electronic surveillance is a foreign power, as defined in section 101(a)(1), (2), or (3) [50 USCS 1801(a)(1)(2), or (3)], and each of the facilities or places at which the surveillance is directed is owned, leased, or exclusively used by that foreign power, the order need not contain the information required by subparagraphs (C), (D), and (F) of subsection (b)(1) [50 USCS 1801(b)(1)(C), (D), and (F)], but shall generally describe the information sought, the communications or activities to be subjected to the surveillance, and the type of electronic surveillance involved, including whether physical entry is required.

(d) Duration of order, extensions; review of circumstances under which information was acquired, retained, or disseminated. (1) An order issued under this section may approve an electronic surveillance for the period necessary to achieve its purpose, or for ninety days, whichever is less, except that

an order under this section shall approve an electronic surveillance targeted against a foreign power, as defined in section 101(a)(1), (2), or (3) [50 USCS 1801(a)(1), (2), or (3)], for the period specified in the application or for one year, whichever is less.

(2) Extensions of an order issued under this title [50 USCS 1801 et seq.], may be granted on the same basis as an original order upon an application for an extension and new findings made in the same manner as required for an original order, except that an extension of an order under this Act for a surveillance targeted against a foreign power, as defined in section 101(a)(5) or (6) [50 USCS 1801(a)(5) or (6)], or against a foreign power as defined in section 101(a)(4) [50 USCS 1801(a)(4)] that is not a United States person, may be for a period not to exceed one year if the judge finds probable cause to believe that no communication of any individual United

States person will be acquired during the period.

(3) At or before the end of the period of time for which electronic surveillance is approved by an order or an extension, the judge may assess compliance with the minimization procedures by reviewing the circumstances under which information concerning United States persons was acquired, retained, or disseminated.

Section 1806(a), Compliance with minimization procedures; privileged communications; lawful purposes.

Information acquired from an electronic surveillance conducted pursuant to this title [50 USCS 1801 et seq.] concerning any United States person may be used and disclosed by Federal officers and employees without the consent of the United States person only in accordance with the minimization procedures required by this title [50 USCS 1801 et seq.] No otherwise

privileged communication obtained in accordance with, or in violation of, the provisions of this title [50 USCS 1801 et seq.] shall lose its privileged character. No information acquired from an electronic surveillance pursuant to this title [50 USCS 1081 et seq.] may be used or disclosed by Federal officers or employees except for lawful purposes.

Section 1806(f), In camera and ex parte review by district court.

"Whenever a court or other authority is notified pursuant to subsection (c) or (d) of this section, or whenever a motion is made pursuant to subsection (e) of this section, or whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States of any state before any court or other authority of the United States or any State to discover, obatin, or suppress evidence or information obtained or derived

from electronic surveillance under this Act, the United States district court in the same district as the authority, shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that discovery or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted.". In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.

Section 1806(g), Suppression of evidence; denial of motion.

If the United States district court pursuant to subsection (f) determines that the surveillance was not lawfully authorized or conducted, it shall, in accordance with the requirements of law, suppress the evidence which was unlawfully obtained or derived from electronic surveillance of the aggrieved person or otherwise grant the motion of the aggrieved person. If the court determines that the surveillance was lawfully authorized and conducted, it shall deny the motion of the aggrieved person except to the extent that due process requires discovery or disclosure.

Section 1809(a), (c), Criminal sanctions,

(a) Prohibited activities

A person is guilty of an offense if he intentionally--

(1) engages in electronic surveillance under color of law except as authorized by

statute; or

(2) discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by statute.

(c) **Penalties.** An offense described in this section is punishable by a fine of not more than $10,000 or imprisonment for not more than five years, or both.

Section 1810, Civil liability,

An aggrieved person, other than a foreign power or an agent of a foreign power, as defined in section 101(a) or (b)(1)(A) [50 USCS 1801(a) or (b)(1)(A)], respectively, who has been subjected to an electronic surveillance or about whom information obatined by electronic surveillance of such person has been disclosed or used in violation of section 109 [50 USCS 1809]

shall have a cause of action against any person who committed such violation and shall be entitled to recover--

(a) actual damages, but not less than liquidated damages of $1,000 or $100 per day for each day of violation, whichever is greater;

(b) punitive damages; and

(c) reasonable attorney's fees and other investigation and litigation costs reasonably incurred.

2. H.R. Rep. No. 1283, 95th Cong. 2d Sess. Subsection 106(h) at 93, & Section 110 at 98

Subsection 106(h) of H.R. Rep No. 1283 in pertinent part states:

A decision of illegality may not always arise in the context of suppression; rather it may, for example, arise incident to a discovery motion in a civil trial. Here, again, the bill does not specify what the court should order. Again, the court should

grant the motion only "in accordance with the requirements of law." Here, however, the requirements of law would be those respecting civil discovery. In other words, once the surveillance is determined to be unlawful, the intent of this section is to leave to otherwise existing law the resolution of what, if anything, is to be disclosed.

Section 110 of H.R. Rep. No. 1283 states:

This section imposes civil liabilities for violations of section 109(a)(1) and 109(a)(2), and authorizes an "aggrieved person" as defined in section 101(k) to recover actual damages, punitive damages, and reasonable attorney's fees and costs. Since the Civil cause of action only arises in connection with a violation of the criminal provision, the statutory good faith defense, though applicable, does not have to

be restated. Although included in the definition of "aggrieved person", foreign powers and non-U.S. persons who act in the United States as officers or employees of foreign powers would be prohibited from bringing actions under section 110.

The agent of a foreign power exclusion of section 110 is narrower than the corresponding provision of H.R. 7308, as introduced. The exclusion only applies to those who come within the definition of agent of a foreign power because they act in the United States as an officer, member or employee of a foreign power, see section 110(b)(1)(A). The foreign visitors covered by the second part of the definition, see section 110(b)(1)(B) would have cause of action under the provision. The original bill excluded both of these classes of agents of a foreign power. The committee believes that the lesser exclusion is more appropriate. As regards the first category those barred from the civil remedy will be

primarily those persons who are themselves immune from criminal or civil liability because of their diplomatic status. In regard to the second category it is difficult to see what would be gained by denying the civil remedy in practical terms. In proving the exclusion applied the government would more than likely be forced to make the same showing that it would make in proving that the surveillance was lawful.

3. Executive Order 12356

Section 1.6, Limitations on classifications.

(a) In no case shall information be classified in order to conceal violations of law, inefficiency, or administrative error, to prevent embarrassment to a person, organization, or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interest of national security.

4. Freedom of Information Act (FOIA), 5 USCS 552, Section 552(a)(4)(B), 552(b)(1)(A):

Section 552(a)(4)(B), Jurisdiction. On complaint, the district court of the United States in the district which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

Section 552(b)(1)(A), FOIA exemption.

552(b) in pertinent part states:

(b) This section does not apply to matters

that are--.

(1)(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy.

5. Judicial Review, 5 USCS Section 706

706(2)(A) & (B), Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of applicability of the terms of an agency action. The reviewing court shall--

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricous, an abuse of discretion, or otherwise not in accordance with law;

(B) Contrary to constitutional right, power, priviledge, or immunity;

6. Constitution of the United States

Certain rights granted to appellant by the Constitutional Amendments, have been violated via the unlawful electronic surveillance, rights such as:

a. Right to Privacy

b. Right to Freedom of Association

c. Right to Freedom of Speech

d. Right to be free from unreasonable searches and seizures

e. Right to Due Process of Law

f. Right to petition the government for a redress of grievance

g. Right to vote

h. Right to be free from involuntary servitude

j. Right to equal protection of law

k. Right to free excercise of religion.

7. Disqualification of justice, Judge, or magistrate, 28 USCS Section 445

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

8. Conspiracy against rights, 18 USCS 241:

If two or more persons conspire to injure, oppress, threaten or intimidate any inhabitant of any State, Territory, or District in the free exercise or enjoyment of any right or priviledge secured to him by the Constitution or laws of the United States, or because of his having to exercise the same; or ...

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

9. Deprivation of rights under color of law, 18 USCS Section 242

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, priviledges, or immunities secured or protected by the Constitution or

laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if bodily injury results shall be fined under this title or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life.

10. Federally protected activities, 18 USCS Section 245(b)(2)(C)

(b) whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with or attempts to injure, intimidate or interfere with --

(2) any person because of his race, color, religion or national origin and because he is or he has been--

(C) applying for or enjoying employment, or any prerquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency; shall be fined not more than $1000, or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than $10,000, or imprisoned not more than 10 years, or both; and if death results shall be subjected to imprisonment for any term of years or for life.

11. Obstruction of persons in the free exercise of religious beliefs, 18 USCS Section 247(a)(2) and (c)

(a) Whoever, in any of the circumstances referred to in subsection (b) or this section--

(2) intentionally obstructs, by force or threat of force, any person in the enjoyment of that person's free exercise of religious

belief, or attempts to do so;

shall be punished as provided in subsection (c) of this section. Subsection (c) states:

The punishment for a violation of subsection (a) of this section shall be--

(1) If death results, a fine in accordance with this title and imprisonment for any term of years or life or both;

(2) if serious bodily injury results, a fine in accordance with this title and imprisonment for not more than ten years, or both; and

(3) in any other case, a fine in accordance with this title and imprisonment for not more than one year, or both.

12. Statements or entries generally, 18 USCS 1001:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or

makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

13. Obstruction of proceedings, 18 USCS 1505

This section in pertinent part states:

[W]hoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, ... shall be fined not more than $5,000 or imprisoned not more than five years, or both.

14. Perjury generally, 18 USCS Section 1621

Whoever--

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable

whether the statement or subscription is made within or without the United States.

15. Civil action for deprivation of rights, 42 USCS Section 1983.

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, priviledges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

16. Conspiracy to interfere with civil rights, 42 USCS 1985:

(2) Obstructing justice; intimidating party: If two or more persons in any State or territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified ... or if two or more persons conspire for the purpose of impeding, hindering, obstructing or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

this subsection in pertinent part states: [I]n any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby exercising any right or priviledge of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.